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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT SEATTLE

8 BRENT NICHOLSON, *et al.*,

9 Plaintiffs,

10 v.

11 THRIFTY PAYLESS, INC., *et al.*,

12 Defendants.

No. C12-1121RSL

ORDER GRANTING IN PART  
MOTION FOR ATTORNEY'S FEES  
ON APPEAL

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14 This matter comes before the Court on "Defendants' Motion for Attorney Fees on  
15 Appeal." Dkt. # 174. The Ninth Circuit transferred consideration of defendants' request for fees  
16 and costs on appeal to the undersigned, and defendants seek an award of \$429,294.00 under the  
17 fee-shifting provisions of the lease agreements and RCW 4.84.330. Plaintiffs oppose the request,  
18 arguing that defendants are not the prevailing party on appeal, that any award of fees must be  
19 segregated by issue, that the hours expended were unreasonable, that certain categories of fees  
20 are not recoverable, and that plaintiff Brent Nicholson is not liable under the contracts. Having  
21 reviewed the dockets in this matter and on appeal as well as the memoranda, declarations, and  
22 exhibits submitted by the parties, the Court finds as follows:

23 **A. Prevailing Party and Segregation of Fees**

24 On appeal, the parties challenged the undersigned's judicial estoppel, contract, attorney's  
25 fees, and pre-judgment interest rulings, virtually all of which arose out of or resolved plaintiff's  
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ORDER GRANTING IN PART MOTION  
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1 contract claim. Neither side achieved complete victory. Defendants obtained favorable rulings  
2 on judicial estoppel, the joint and several liability of the LLCs, and Nicholson's personal liability  
3 for overpayments to No One to Blaine. They also obtained a remand for further consideration of  
4 their claim for prejudgment interest. Plaintiffs, on the other hand, were able to overturn  
5 Nicholson's personal liability for fees under the lease agreements. Under these circumstances,  
6 the Court must determine whether there was a prevailing party on appeal or "whether, on  
7 balance, neither party prevailed sufficiently to justify an award of attorney fees" under the  
8 contract. Zintel Holdings, LLC v. McLean, 209 Cal. App.4th 431, 439-40 (2012). See also  
9 Marine Enters., Inc. v. Security Pac. Trading Corp., 50 Wn. App. 768, 772-73 (1988). When  
10 deciding whether there is a prevailing party on the contract, "the trial court is to compare the  
11 relief awarded on the contract claim or claims with the parties' demands on those same claims  
12 and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and  
13 similar sources. The prevailing party determination is to be made only upon final resolution of  
14 the contract claims and only by a comparison of the extent to which each party ha[s] succeeded  
15 and failed to succeed in its contentions." Hsu v. Abbata, 891 P.2d 804, 813 (Cal. 1995)  
16 (alteration in original). See also Riss v. Angel, 131 Wn.2d 612, 633-34 (1997) ("If neither  
17 wholly prevails, then the determination of who is a prevailing party depends upon who is the  
18 substantially prevailing party, and this question depends upon the extent of relief afforded the  
19 parties.").

20 The Court finds that defendants substantially prevailed on the contract claims on appeal  
21 and are entitled to a fee award under the terms of the lease agreements. Although plaintiffs were  
22 able to show error in the undersigned's analysis of Nicholson's personal liability for attorney's  
23 fees, plaintiffs failed to reinstate any of their claims, failed to reverse the rent award against  
24 Nicholson personally, and failed to convince the Ninth Circuit that fees should be apportioned  
25 amongst the LLCs. The LLC plaintiffs obtained nothing through the appellate process, and  
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1 Nicholson's victory on the fee award was not complete: he did not convince the Ninth Circuit  
2 that he was not personally liable for \$1,819,340.21 in attorney's fees under the lease agreement,  
3 only that the matter should be remanded for further consideration. The Ninth Circuit upheld  
4 dismissal of plaintiffs' damages claim (which exceeded \$55 million), affirmed Nicholson's  
5 obligation to refund \$103,500 in rent payments, affirmed the joint and several liability of the  
6 LLCs, and remanded Thrifty's claim for prejudgment interest. A comparison of the relief sought  
7 and the relief obtained on any metric shows that defendants prevailed on appeal.

8       Plaintiffs argue that, even if defendants are the prevailing parties on appeal, they must  
9 segregate the fees and costs by issue and the Court should deny fees for time spent on  
10 Nicholson's personal liability and the arguments that the Ninth Circuit did not reach in its  
11 decision. Washington law recognizes that, in some instances, the prevailing party received so  
12 little of what it originally sought and/or failed on a number of distinct, severable contract claims  
13 as to make it unfair or unjust to award all of the fees incurred. See Marassi v. Lau, 71 Wn. App.  
14 912, 916-17 (1993), abrogated on other grounds, Wachovia SBA Lending, Inc. v. Kraft, 165  
15 Wn.2d 481, 490 (2009).<sup>1</sup> That is not the case here. Defendants defeated every one of plaintiffs'  
16 claims and obtained relief on their only counterclaim. The Ninth Circuit did not need to reach  
17 defendants' alternative grounds for the same relief, but once plaintiffs initiated an appeal seeking  
18 to reinstate their claims, defendants were entitled to raise all available arguments: there is  
19 nothing unfair about shifting the costs of having to do so pursuant to the contractual agreement  
20 between the parties. The only remaining open issues (pre-judgment interest and Nicholson's  
21 personal liability for attorney's fees) are collateral to the underlying contract claims and do not  
22 change the fact that defendants prevailed on all claims asserted in this matter. Because there is  
23 no unfairness, the Court declines to exercise its discretion under Washington law to ameliorate  
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25       <sup>1</sup> Plaintiff does not identify any California cases adopting a similar mechanism.  
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1 any harshness or injustice that may arise from application of the “substantially prevailing”  
2 standard.

3 **B. Reasonableness of Hours Expended and Unrecoverable Amounts**

4 Plaintiffs argue that the manner in which defendants litigated this case, namely by waiting  
5 two years before filing a motion for summary judgment based on judicial estoppel, unreasonably  
6 inflated the number of hours spent. To the extent that argument has any merit, the time to raise it  
7 was in response to defendants’ motion for attorney’s fees following the entry of judgment in  
8 February 2015. The issue now before the Court is whether defendants are contractually entitled  
9 to recover attorney’s fees on appeal. This argument has been waived.

10 Plaintiffs also argue that, although counsel for both parties charge similar rates, plaintiffs’  
11 lawyers recorded only \$212,106.00<sup>2</sup> in fees since the appeal was filed, whereas defense counsel  
12 is seeking \$429,294.00 over essentially the same time period. Plaintiffs maintain that this  
13 disparity shows that defendants’ request for fees “is replete with time entries showing  
14 unnecessary, duplicated and wasted effort,” but they identify only two specific examples and  
15 provide generic references to “multiple-attorney conferences” and “fees related to executing on  
16 and securing the judgment.” Dkt. # 179 at 6 and 8. The Court, having reviewed the billing  
17 records in detail, discounts the fee request for the following reasons:

18 1. Fees incurred in the district court after judgment was entered were not “on appeal” and  
19 are not properly before the Court. These fees are not recoverable.

20 2. Fees incurred in an attempt to secure or execute on the judgment were not incurred  
21 while pursuing a contract claim or on appeal. They are not, therefore, recoverable in this action,  
22 although the applicable garnishment and execution procedures may permit an award of fees in  
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24 <sup>2</sup> This number is taken from plaintiffs’ memorandum (Dkt. # 179 at 8). The Declaration of  
25 Susannah C. Carr supports a lower number (Dkt. # 181 at ¶ 6), but the Court presumes that the missing  
26 “Hill Decl. at ¶4” would support the higher value.

1 the collateral proceedings.

2 3. Defendant had six attorneys and three legal assistants working on the appeal in this  
3 matter. For the most part, work was appropriately assigned and tasks were staffed commensurate  
4 with their importance. Where the need to keep that many people informed led to waste and  
5 duplication of effort, however, the Court reduced the overall fees charged by the collective.

6 4. Certain time entries do not appear to have any relationship to the contract claims for  
7 which fees can be recovered, such as the preparation of an audit response. The fees associated  
8 with these tasks are not recoverable.

9 5. Fees related to defendants' failure to comply with the word limits imposed by the Ninth  
10 Circuit are not recoverable.

11 6. Although counsel's time entries are specific as to the work performed, many of them  
12 describe more than one type of activity. Where unrecoverable tasks, as set forth above, are  
13 included with recoverable tasks, the Court made an effort to allocate the fees whenever there was  
14 a reasonable basis for doing so. If no reasonable basis for allocation were apparent from the  
15 entries, the fee entry was deducted in its entirety.

16 After making deductions as described above, the lodestar amount is \$247,029.50. No  
17 further adjustments are necessary or appropriate.

18 **C. Nicholson's Liability Under the Contracts**

19 For the reasons set forth in the Court's "Order Denying Motion to Release Funds,"  
20 Nicholson is personally liable for attorney's fees under the lease agreements even though he was  
21 not a party to the contracts.

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1 For all of the foregoing reasons, defendants' motion for an award of attorney's fees on  
2 appeal is GRANTED in part. Defendants are awarded fees in the amount of \$247,029.50 on  
3 appeal. All twelve named plaintiffs are jointly and severally liable for that amount.  
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5 Dated this 8th day of January, 2018.  
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8 Robert S. Lasnik  
9 United States District Judge  
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